



New Year, New Rules?

What HR and Risk Management Professionals Should Know About Key Employment, Compliance, and Insurance Issues Impacting the Cannabis Industry in 2022.

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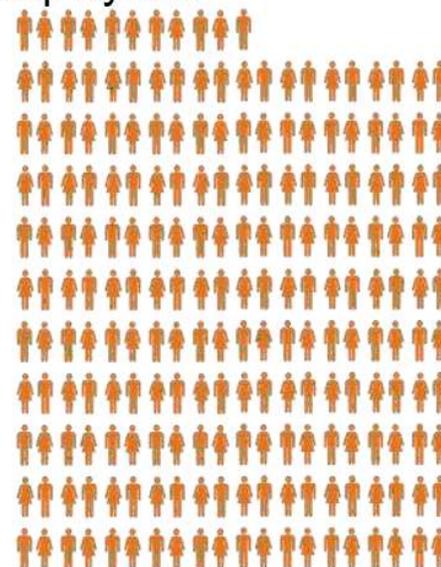
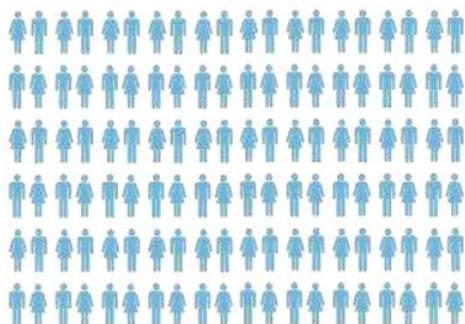
Careers in Cannabis HR Community
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2022 Cannabis Industry Overview

2022 Cannabis Industry Outlook

Cannabis sales predicted to exceed \$30 billion in 2022

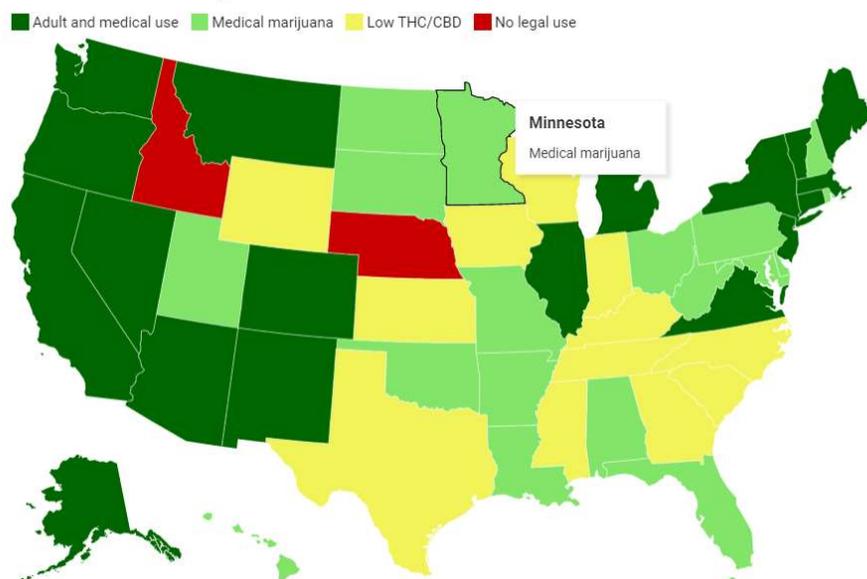
- In early 2017, approximately 120,000 people were employed in the cannabis industry
- As of late 2021, the cannabis industry has more than 320,000 full-time employees



Cannabis Industry: 2022 Legislative Update

- Medical cannabis legal in 36 states
- Adult-use legal in 18 states
- Federal legislation pending
- 2022 may see Delaware, Ohio, and Oklahoma enact adult-use laws
- Federal/state/local inconsistencies continue to create legal challenges.
- Rules applicable to CBD/THC/other cannabinoids differ.

Cannabis Laws By State



Tension Between Federal Law and State Law

Federal Compliance Required

- Employers are not excused from compliance with federal law “just because their business practices are federally prohibited.” *Kenney v. Helix TCS, Inc.*, 939 F.3d 1106 (10th Cir. 2019).
- Applies to: **FLSA, ADA, OSHA, HIPAA, TCPA**

Federal Law Offers No Benefit

- But cannabis companies may not have the **benefit** of federal law applicable to:
 - **Contracts**
 - *Polk v. Gontmakher*, No. 18-cv-01434, 2020 WL 2572536 (W.D. Wash. May 21, 2020) (violation of CSA to provide equitable interest in a cannabis business); *J. Lilly, LLC v. Clearspan Fabric Structures Int'l, Inc.*, No. 18-cv-01104, 2020 WL 1855190, at *12 (D. Or. Apr. 13, 2020) (CSA precluded lost profits for the breach of a contract to build a growhouse).
 - **Bankruptcy protection**
 - **Tax code (IRS 280E)**
 - **Trademark/patent rights**

Compliance and Risk Management Issues

- **Employment Liability**
- **Contractual Liability**
- **Products Liability**
- **D&O Liability**
- **Cyber Liability**
- **Property/Intellectual Property Liability**

Employment Liability Spotlight

Overlapping Employment Leave Laws

- Family and Medical Leave Act (FMLA)
- State-Specific Family Leave
- Americans with Disabilities Act (ADA)
- Employer leave policies

Overlapping Leave Laws: Coverage Questions

- Which *employers* are covered?
 - Size of your company
 - In/Out of state employers with In/Out of state employees
- Which *employees* are covered?
 - Classification (full-time, part-time, temporary)
 - Any tenure requirement

Overlapping Leave Laws: “Family” Members

- Immediate family members
 - Spouse, domestic partner
 - Children
 - Parents
- Extended family
 - Grandchildren and grandparents
 - Siblings
 - In-laws
 - *De facto* family—nature of relationship creates expectation of providing care

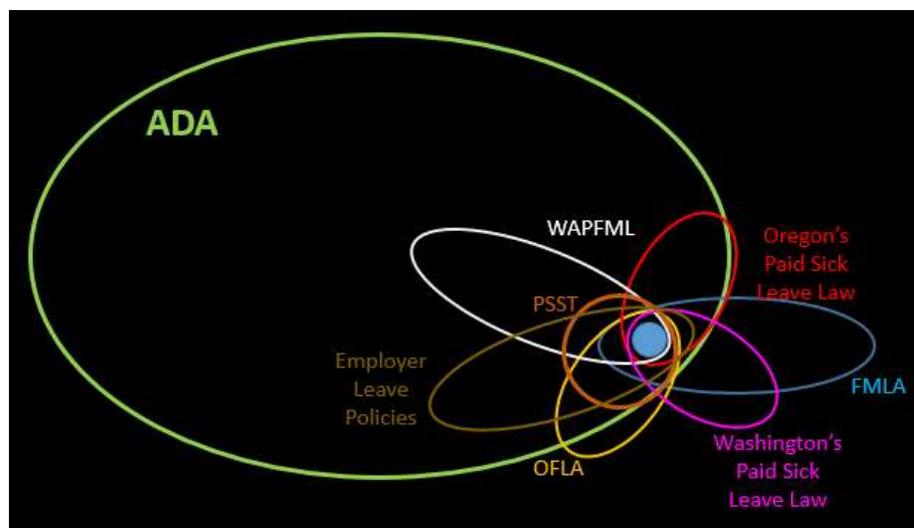
Overlapping Leave Laws: Other Considerations

- Leave stacking
 - Concurrent or consecutive leave
 - Employee's leave allowance restarts each claim year
- Strong anti-retaliation provisions
 - Employers may not interfere with, restrain, or deny an employee's rights to leave or benefits, or discharge, discriminate or retaliate against an employee for exercising rights or filing a complaint
 - Private right of action for lost wages or other damages, attorneys' fees, and potential double damages for willful violations

Americans with Disabilities Act (ADA)

Don't Forget About the ADA

- Leave may not end with state and federal job-protected leave
- Reasonable accommodation for a disability may require additional leave



Wage and Hour Audit Considerations

Audit Considerations: Where to Start

1. **WHO AND HOW:** Determine who is involved and how the audit will be conducted.
2. **SCOPE:** Assess the scope of the audit – all practices or focused on specific concerns?
3. **APPROACH:** What approaches will you utilize? How will you collect records, what records? Who will you interview? What will your end product be?
4. **CORRECTIONS:** If making corrections, develop a strategy to mitigate risk.

New Year, New Employment Questions

Rolling Back “New Rules”

Prior administration had rolled out updated rules under the Fair Labor Standards Act (FLSA), and the new administration has withdrawn both:

1. **Independent Contractor Analysis:** Now back to “economic realities” test.
2. **Joint Employment Test:** Now back to “degree of association” standard.

Revised/New Rules on Tip Pools

- Effective November 23, 2021, the Department of Labor’s “new” rule clarifies that:
 - So long as tipped employees receive the full minimum wage (without tip credit) tip pooling is allowed, and now *may* include dishwashers, cooks or other employees who do not customarily receive tips.
 - Under the federal rule, managers and supervisors cannot participate in a tip pool or otherwise keep tips that employees receive, but are permitted to accept tips they receive from customers for services they “directly” and “solely” provide – and keep all or contribute a portion to other employees and/or or a tip pool.
- Effective December 28, 2021, in addition to the above a new “dual role” rule clarifies that an employee may only receive tip credit when working in a tip-qualifying role.

New Year, New COVID-19 Rules

Presidential Executive Actions

- **Executive Order 1399: Protecting the Federal Workforce and Requiring Mask-Wearing Issued January 20, 2021.** Requires federal agencies to comply with CDC guidance on mitigation measures and enact social distancing and mask wearing among federal government employees and agency visitors.
- **“Path Out of the Pandemic: COVID -19 Action Plan” announced September 9, 2021.** Established a Safer Federal Workforce Task Force (the “Task Force”) that was charged with issuing guidance to implement his Executive Orders, including:
 - **EO 14043: Requiring Vaccination for Federal Employees by November 22, 2021.**
COURT-ISSUED INJUNCTION ON RULE.
 - **EO 14042: Addresses Vaccine Mandate and other Safety Protocols for Federal Contractors.** **ENFORCEMENT CURRENTLY ON HOLD.**

OSHA's "Vaccine or Test" Rule

- In response to President Biden's "Path Out of the Pandemic: COVID-19 Action Plan," OSHA issued its Emergency Temporary Standard (ETS) on November 4, 2021:
 - Would apply to *all employers with 100 or more employees*.
 - Covered employers must adopt either a vaccination policy or a vaccine or test policy, as well as masking and additional safety measures.
 - Initially intended to be effective December 5, 2021 with vaccination required by January 4, 2022.
 - **ETS HAS BEEN WITHDRAWN BY OSHA. PERMANENT RULE TO FOLLOW.**

State “Vaccine or Test” Mandates

- Washington
- Oregon
- California
- **KEY TAKEAWAYS TO THINK ABOUT:**
 - Verification of vaccine status
 - Exemptions
 - Paying for vaccination (time) or testing
 - Working with insurance carriers (workers’ comp, etc.)

Insurance and Risk Transfer Considerations

Key Insurance Options For the Cannabis Industry

- Insurance is not a substitute for implementing appropriate policies and procedures, or designing or selling safe and legally compliant products, but it can reduce exposure to liability.
- Minimum insurance requirements vary by state, but minimum limits may not be enough protection.
- Types of Insurance Include:
 - Commercial General Liability
 - May include products, recall, and prop 65 coverage
 - Commercial property/business interruption/crime
 - Products Liability
 - Recall Coverage
 - Crop
 - Auto
 - Cargo
 - Employment Practices (EPLI)
 - Cyber
 - Professional/E&O
 - Workers Compensation



Cannabis Insurance Pitfalls

- Cannabis exclusion
- Health hazard exclusion
- Wage and hour exclusion (EPLI insurance)
- IP infringement
- Consumption on premises exclusion
- Pollution or specified pollutants/pesticides
- Violation of law exclusion
- Products/completed operations exclusions
- Specified products exclusions (vaping, food products, delta-8)
- Public policy exclusion
- Defense costs within limits



How to Maximize Your Insurance.

- Read your policies! Then have your lawyer read them again.
- Audit (at least annually) to ensure insurance meets needs and aligns with legal changes or new business offerings.
 - Consider outside contract insurance requirements.
 - Complete insurance application carefully and thoroughly to avoid recession or denial of claims based on alleged misrepresentations (e.g., protective safeguards)
 - Request and review specimen policies, including all exclusions and endorsements
 - Obtain final policies and save in files
- Timely notice of claim (or potential claim) per policy requirements.
- Pursue claims with the help of outside insurance coverage counsel, including where necessary and appropriate, through litigation.



Other Contractual Risk Transfer Options

- **Due Diligence**
 - Ensure entities are properly licensed, where they are licensed, all necessary permits, and in compliance with law
- **Representations and warranties in contracts**
 - E.g., warrant that each party understands the legal status of cannabis and that neither will assert illegality to avoid contractual obligations; understanding of compliance with law (excluding federal/CSA)
- **Contractual indemnity clauses**
 - Broad if you're the party seeking indemnity;
 - Narrow if you're indemnifying
- **Limitations of liability** – if you're the indemnitor, limit liability for consequential damages or to a certain contractual amount
- **Force Majeure clauses**
- **Additional insured requirements for suppliers and vendors**
- **Arbitration clauses** – may be useful due to problems with enforceability of cannabis contracts in some courts

Other Risk Management Protocols to Limit Liability

- Recordkeeping and document retention procedures
- Product recall plan
- Cyber data privacy protocol
- Cyber breach response plan
- Privacy/HIPAA policies
- TCPA – avoid use of “autodialer” for marketing and obtain double “opt-ins” for text message marketing

2022: Final Thoughts

When Outside Counsel Can Assist

- Preparation of policies and procedures (employment, records retention, COVID-19, product recall, litigation)
- Contract drafting and negotiation
- Due diligence
- Insurance placement and renewal
- Receipt of a demand, claim, or lawsuit
- Assistance with an insurance claim, denial, or “reservation of rights”
- Product recall notice
- Government investigation or subpoena
- Cyber attack or breach

Thank You! Please reach out to us with any questions.



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